IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-671

CECILIA ESPINOZA and RUDOLFO ESPINOZA,

Petitioners,

—v.—

FARAH MANUFACTURING CO., INC.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, *AMICUS CURIAE*

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Interest of *Amicus**

The Mexican American Legal Defense and Educational Fund (MALDEF) was established on May 1, 1968, primarily to provide legal assistance to Mexican-Americans. It is headquartered in San Francisco with additional offices in San Antonio, Los Angeles, Denver, Albuquerque, and Washington, D.C.

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* The letters of Petitioner and Respondent, consenting to the filing of this brief *amicus curiae* out of time, have been filed with the clerk.

The term "Chicano" is a shortened version or corruption of the term "Mexicano". The term has often been applied broadly and loosely to Mexican-Americans in the Southwest. This group includes recent immigrants to the United States as well as people whose connection with the United States goes back a number of generations. Many Mexican-Americans are United States citizens. Many others are not. A significant part of this group includes persons "lawfully admitted for permanent residence," the status that is one step before citizenship.

Courts have recognized that Mexican-Americans constitute a separate group, often subject to distinct discrimination in today's society. E.g., *Hernandez* v. *Texas*, 347 U.S. 475 (1954). Quite recently a federal district court surveyed the situation as regards the Mexican-American in Texas.

> Because of long standing educational, social, legal, economic, political and other widespread and prevalent restrictions, customs, traditions, biases and prejudices, some of a so-called *de jure* and some of a so-called *de facto* character, the Mexican-American population of Texas, which amounts to about 20%, has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others.

Graves v. *Barnes*, 343 F. Supp. 704, 728 (three-judge court) (W.D. Texas 1972), *aff'd sub nom. White* v. *Regester*, 41 U.S.L. Week 4885 (June 18, 1973). See also, *Keyes* v. *School District No. 1, Denver, Colorado*, 41 U.S.L. Week 5002 (June 21, 1973).

There are approximately ten million Mexican-Americans, making them one of the largest as well as one of the most discriminated against groups in the United States. They are also one of the most powerless in the political arena. A significant reason for this powerlessness is the fact that many persons of Mexican origin who lawfully reside in the United States are not citizens and are thus excluded from the franchise. Mexicans who are permanent resident aliens make important contributions to American life and assume fundamental duties toward the United States (such as paying taxes and serving in the armed forces), but are unable to use the electoral process to advance their interests. MALDEF thus sees as one of its roles the effective use of the courts to safeguard and secure the legal rights of persons of Mexican origin who are permanent resident aliens.

Question Presented

Whether refusal to hire a permanent resident alien actually residing in the United States solely on the basis of alienage is unlawful under Title VII of the Civil Rights Act of 1964 or 42 U.S.C. §1981.

Statement of the Case

It is important to consider the exact scope of the facts and issues in this case. On July 19, 1969, Cecilia Espinoza was denied employment by Farah Manufacturing Company because she was not a United States citizen. Cecilia Espinoza is a permanent resident alien actually residing in the United States. She is married to Rudolfo Espinoza, also a plaintiff in this case, who is an American citizen. They have a four year old daughter. Cecilia Espinoza has ex-

pressed the desire to become a citizen herself when she can acquire the necessary language skills and education. App. pp. 77-78.

No one for a moment suggests that Title VII or any federal regulation or statute compels Farah to employ any alien who is not legally in this country. See 29 C.F.R. §1606.1(d) (applicable Equal Employment Opportunity Commission regulation); Brief of Petitioners at p. 11. Similarly Farah is not being asked to employ any alien if to do so would violate any valid Immigration and Naturalization Service or Department of Labor policy concerning aliens. Furthermore, a decision in this case need have no application to the problem of "seasonal commuter aliens," agricultural workers whose legal status within this country has been put in doubt by the recent case of *Bustos* v. *Mitchell*, 41 U.S.L. Week 2573 (D.C. Cir. April 16, 1973). The instant case also has no relevance to the situation of the "daily commuter aliens" (see *Bustos* v. *Mitchell, supra*), who, by means of an Alien Registration Receipt Card (Form I-151, the "green card"), commute daily over the border to work in the United States while actually living in Mexico (or Canada).

Refusal to hire permanent resident aliens actually residing in the United States (persons in Cecilia Espinoza's position) constitutes national origin discrimination. Refusal to hire alien commuters (or even American citizens commuting from their homes in Mexico), on the other hand, does not automatically constitute national origin discrimination as such a refusal could be wholly based on residence. Actual residence within the United States could be a bona fide occupational qualification, within the meaning of Title VII, for Farah employees. Since there is always the possibility

of restriction and delay involved in the crossing of international boundaries, Farah might well demonstrate that effective plant operation requires reliability of personnel which foreign residence could jeopardize. Point might be given to such a demonstration by certain activities not too long ago along the United States-Mexican border. The Bureau of Customs and the Immigration and Naturalization Service cooperated to seal the border to narcotics traffic. Delays in border crossings of up to four hours were reported. F. Belair, *Operation Intercept: Success on Land, Futility in the Air,* N.Y. Times, p. 43, Oct. 2, 1969.

In the instant case, however, no bona fide occupational qualification exists to justify refusal to hire permanent resident aliens actually residing in the United States. Indeed since the inception of the original cause of action in 1969 Farah has not even attempted to offer any business reason for its policy. Since its policy is arbitrary and since it operates to discriminate on the basis of national origin, it is unlawful.

ARGUMENT

MALDEF is in accord with the arguments presented in the Brief for Petitioners. It offers the following argument only in amplification of points made by the petitioners.

Farah has made much of the fact that 95% of its employees are Spanish-surnamed. Like the Fifth Circuit it makes the too quick identification of ethnic discrimination with national origin discrimination. What must be remembered, however, is that national origin discrimination has never been a phenomenon distributed evenly over an entire ethnic group. The "national origin" discrimination

one suffers naturally decreases the further in years and generations one is removed from foreign origins. The acquiring of United States citizenship, the increased familiarity with the language, customs, and mode of life of one's new home increase the assimilation process. It is unrealistic to expect a third generation American citizen and a newly arrived immigrant to be subject to similar discrimination because their last names are both Rivera. A law that could be satisfied with a list of employees' last names would be similarly unrealistic. It must be assumed that the drafters of Title VII were aware of the true nature of the "national origin discrimination" problem, and it should be interpreted to meet it.

Farah's discrimination comes into play only for the foreign born. If the discrimination was based solely on place of birth, it would clearly be national origin discrimination regardless of the number of Spanish surnamed employees Farah has. By basing the discrimination on citizenship, Farah has merely substituted another element in the classification. This additional element further disadvantages that class of persons most victimized by "national origin" discrimination, i.e., recent immigrants, and those least assimilated into mainstream American life. It is hard to see how this additional discriminatory element operates to nullify the "national origin" discrimination which is the net effect of Farah's policy.

The Equal Employment Opportunity Commission correctly concluded that " . . . discrimination on the basis of citizenship has the effect of discriminating on the basis of national origin . . . " Hence it has ruled that "a lawfully immigrated alien who is domiciled or residing in this country may not be discriminated against on the basis of

his citizenship . . . " 29 C.F.R. §1606.1(d). The EEOC regulation represents the most realistic approach, consistent with the broad ameliorative mandate of Title VII. Farah's argument that the regulation is valid in those instances when citizenship based discrimination is combined with or substituted for a clear-cut total discrimination against a particular ethnic group hides the real issue.

Nor can it be said that EEOC policy has been confused or contradictory on this matter. At pages 9 and 10 of their brief in the Fifth Circuit, Farah cites an EEOC General Counsel opinion in which it is stated that employment discrimination against non-resident aliens does not violate Title VII. They then analogize that case to the present one.

Researchers will discover that neither the opinion nor any reference to it are to be found in the *Employment Practices Guide*. In the periodic revision which the *Guide* undergoes all reference to the opinion was removed and discarded. *Amicus* has succeeded in obtaining directly from Farah's attorney and from the publisher of the *Guide* the material cited. A copy is appended to this brief, at pp. 11-15.

The material proves to be an Opinion Letter of the Acting General Counsel of the EEOC, released April 28, 1967, and issued pursuant to 29 C.F.R. §1601.30(a). In a subsequent notice published by the EEOC in the Federal Register it is stated, "Matter issued pursuant to 29 C.F.R. §1601.30(a) is issued to a specific addressee(s) and has no effect upon situations other than that of the specific addressee(s)." 35 F.R. 18692, December 9, 1970; 1 *Employment Prac. Guide* ¶4070.30 n. 1. To imply that the opinion letter and the EEOC regulation may be placed on the same footing is simply incorrect.

Furthermore, the opinion letter deals with an issue not relevant to this case. As we have made clear, the situation of non-resident aliens is not before this Court.

Farah's attempt to analogize this case to the situation of resident aliens must also fail. First, the notice in the Federal Register cited above shows the clear intention of the EEOC that each opinion letter is designed for one fact situation only. Second, the letter itself carefully limits its discussion of issues.

> Generally speaking, our immigration laws seek to protect domestic labor from competition from foreign labor. . . . To construe Title VII of the Civil Rights Act to protect non-resident aliens from discrimination in favor of United States citizens and resident aliens would place that statute in flat opposition to the policy of the Immigration & Nationality Act, and this result, we are sure, was not Congress' intention.

These considerations are clearly inapplicable in the case of aliens lawfully admitted for permanent residence. Although there is also language in the letter that "national origin" does not refer to whether a person is or is not a United States citizen, the Acting General Counsel makes sure to point out:

> We also reserve any decision regarding discrimination against non-resident aliens of a particular national origin *or regarding discrimination in favor of United States citizens and against resident aliens.*

Id. (emphasis supplied). It is precisely that reserved question to which the EEOC addressed its subsequent regulation, 29 C.F.R. §1606.1(d).

Withdrawing Title VII's protection from aliens would do much to cripple the national origin discrimination prohibition. Not only is it important that EEOC regulations continue to be given "great deference" by this Court, *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 434 (1971), but it is also "the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by a combination of a strict construction of the statute and a battle with semantics." *Culpepper* v. *Reynolds Metals Co.*, 421 F.2d 888, 891 (5th Cir. 1970). Further, a decision in favor of the Petitioners would be fully consistent with constitutional principle, so recently rearticulated by this Court, that disfavors discrimination against lawfully admitted resident aliens. *Sugarman* v. *Dougall*, 41 U.S.L. Week 5138 (June 25, 1973); *In re Griffiths*, 41 U.S.L. Week 5143 (June 25, 1973).

CONCLUSION

For the reasons indicated above, the decision of the Court of Appeals for the Fifth Circuit should be reversed and the case remanded to the District Court for the granting of appropriate relief.

Respectfully submitted,

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Counsel are indebted to George Schneider of the Columbia Law School, Class of 1974, for his assistance in the preparation of this brief.

APPENDIX

Opinion Letter of Acting General Counsel, Equal Employment Opportunity Commission, March 21, 1967. Released April 28, 1967.

In your letter you present the following fact situation:

> Our client employs a substantial number of professional performers. These employees are represented by a labor organization as their collective bargaining agent. For many years the company and the union have enjoyed a harmonious and wholesome relationship.
>
> The union has presented a proposal for adoption by the company which has caused the client much concern because it may be violative of the Civil Rights Act of 1964, particularly Sec. 703(a)(1) and (2). The union urges that the company agree that it maintain a policy of employing one citizen of the United States or one resident alien in the United States on each occasion that it employs a non-resident alien. The company's business is based upon the premise that it engages the world's greatest performers, and there has been public acceptance of this fact; consequently, the sole criteria used by the company in the hiring of its professional performers is the ability of the individual to perform, the uniqueness of the act, and the receptivity of the audience.
>
> When the employees are engaged in a foreign country by our client, they are permitted to render their services in the United States by obtaining an H-1 Visa,

granted to individuals with exceptional and unique talent. Although national origin is not the reason for employment, nevertheless, the historical fact is that the overwhelming proportions of new acts and performers in this particular field have been and are non-resident aliens. As a general rule, the non-resident alien is employed in a foreign country and is then brought to the United States to perform his services; however, on occasion the non-resident alien may come to the United States for the purpose of seeking employment with our client and after his arrival, he may be employed by the company.

On the basis of the above facts you ask the following questions:

1. May a company and a union agree between themselves that for each non-resident alien who is employed outside of the country, employment must be given by the company to a citizen of the United States or a resident alien?

2. May a company and a union agree that for each non-resident alien who comes to the United States seeking employment with the company and is employed by the company after his entry into the United States, the company must hire a citizen of the United States or a resident alien?

Title VII of the Civil Rights Act prohibits discrimination in employment based on race, color, religion, sex or national origin. You present a situation in which the union has proposed that the company hire at least one United States citizen or resident alien for each non-resident alien

that it hires. The company would, of course, be free to hire a greater proportion of United States citizens or resident aliens if it so desired. This proposal, by placing a quota limit on the employment of non-resident aliens, discriminates against this group as a class, and the question is whether such discrimination is consistent with Title VII. We conclude that it is.

It is evident that discrimination against non-resident aliens generally is not the same as discrimination on the basis of national origin. "National origin" refers to the country from which the individual or his forebears came, see 110 Cong. Rec. 2549, not to whether or not he is a United States citizen, nor *a fortiori,* to whether, if an alien, he resides in or without the United States. It may be conceded that a limitation not specifically phrased in terms of national origin may nevertheless have the effect of unlawfully discriminating on the basis of national origin.[1] But where the discrimination is merely against non-resident aliens, it does not appear to us that the limitation is levelled at any particular national group, nor that it is even intended to benefit persons of a particular national origin, since citizens and resident aliens are equally the beneficiaries of the limitation.

Furthermore, it is not the policy of our law to grant to non-resident aliens as a class opportunities for employ-

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[1] Thus, we have previously concluded that an advertisement for "British-trained" or "British-educated" office help would be viewed as an expression of a preference based on national origin unless it could be demonstrated that the preference was in fact based on differences in the nature or quality of their training as opposed to that available in this country.

ment on equal terms with citizens and resident aliens. Generally speaking, our immigration laws seek to protect domestic labor from competition from foreign labor, see Immigration and Nationality Act, as amended, § 203, 8 U. S. C. 1153; 1965 U. S. Code Cong. & Adm. News, pp. 3333-34. Indeed, the non-resident aliens described in your letter may be admitted to this country for the purpose of employment only upon petition of the prospective employer and upon a showing that they are "of distinguished merit and ability" and are coming "to perform temporary services of an exceptional nature requiring such merit and ability," 8 U. S. C. 1101(a)(15)(H); 8 C. F. R. 214.2(h). To construe Title VII of the Civil Rights Act to protect non-resident aliens from discrimination in favor of United States citizens and resident aliens would place that statute in flat opposition to the policy of the Immigration & Nationality Act, and this result, we are sure, was not Congress' intention. We conclude, therefore, that it is not an unlawful employment practice under Title VII of the Civil Rights Act for an employer or a labor organization, by collective bargaining agreements or otherwise, to discriminate against non-resident aliens, generally, and in favor of United States citizens and resident aliens.

In view of the above disposition, we do not reach the question whether the first exemption of section 702 of the Civil Rights Act is applicable to contracts of employment entered into abroad for performance in the United States. We also reserve any decision regarding discrimination against non-resident aliens of a particular national origin or regarding discrimination in favor of United States citizens and against resident aliens.

Finally, you ask whether there is a distinction under Title VII between a native-born citizen and a naturalized citizen. We prefer not to pass on such a question in the abstract, but we might point out that as a general proposition "the rights of citizenship of the native born and of the naturalized person are of the same dignity and are coextensive." *Schneider* v. *Rusk*, 377 U. S. 163, 84 S. Ct. 1187, 1189 (1964).

This is an opinion letter issued pursuant to 29 C. F. R. 1601.30.